In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 495

WALTHAM WATCH CO., ET AL., PETITIONERS

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

This proceeding was brought to prevent misrepresentation, in connection with the use of the widely-known trade name "Waltham" in the advertisement and sale of West German-made clocks, in violation of Section 5 of the Federal Trade Commission Act (App. 2-12).[1]

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[1] Section 5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. 45, provides in pertinent part:

(a)(1) Unfair methods of competition in commerce,

The Waltham Watch Company, located at Waltham, Massachusetts, was founded in 1849, and became a widely known manufacturer of clocks and watches. By 1957 it had ceased the manufacturing of watches, and it had not been in the clock business at all for some time. As a result of a reorganization in 1957 the company transferred to a newly organized Delaware corporation its trademarks, good will and "Waltham" name relating to watches and clocks. The name of the old Massachusetts corporation was changed to Waltham Precision Instrument Company and the Delaware company assumed the name of Waltham Watch Co., its stock being issued to the then existing stockholders of the Massachusetts corporation (Pet. 5a-6a; App. 93-96).

In February 1959, the individual petitioners obtained control of the Delaware company. (App. 93-94, 190), which is the corporate petitioner here. The company did not make watches or clocks, but in March 1958, it had licensed one David Singer trading as Time Industries to use the name "Waltham" in connection with the distribution and sale of clocks. The clocks were all made in West Germany. Under

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and unfair or deceptive acts or practices in commerce, are declared unlawful.

* * * * *

(a) (6) The Commission is empowered and directed to prevent persons * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

"App." referes to the "Appendix to Brief for Petitioners" in the court of appeals and "SS App." refers to the "Separate Supplement to Petitioners' Appendix" in that court.

the license agreement, Time paid a royalty and was required to obtain from the Delaware company prior written approval of all advertising and promotional material (Pet. 5a-6a). In September 1959 the arrangement with Time was changed to provide that the clocks which Time sold under the "Waltham" name were to be imported from Germany by Time itself, instead of by the Delaware company (Pet. 6a).

After an administrative hearing, the examiner found that Time's advertisements and other promotional material were "palpably false, misleading and deceptive" (SS App. 13), and that they had misled many persons into believing that the German-made clocks were the product of the "famous 109-year firm," the "Waltham Watch Company since 1850" (Pet. 7a-8a; SS App. 7-16, 37-38). The examiner further found that although petitioners were aware of these misrepresentations and although petitioners' written approval of Time's promotional material was required, petitioners failed to take any effective steps to stop Time's misleading practice until more than two months after issuance of the complaint (Pet. 8a-9a; SS App. 28-31). Petitioners did not cancel Time's license to use the "Waltham" name until after it had fallen in arrears on its royalty payments (SS App. 36).

On these facts, the examiner concluded that petitioners had placed in the hands of Time the means to deceive the public "as to the manufacturer, its age and reputation, and as to the country of origin of the clocks," and had thereby committed unfair acts and practices in violation of Section 5 of the Federal

Trade Commission Act (SS App. 42-43). Accordingly, he recommended a cease-and-desist order (SS App. 46-47).[2]

The Commission adopted the examiner's decision and upheld the order as appropriate in all respects

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[2] The order was also directed against Time (SS App. 44-46), but this portion of the order was not appealed.

Insofar as it affects petitioners, the order provides in pertinent part as follows (SS App. 46-47):

> It Is Further Ordered that Waltham Watch Company, * * * and its officers * * * in connection with the use of the name "Waltham," in commerce, * * * do forthwith cease and desist from:
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> I. Using or authorizing any person to use the name "Waltham" in connection with the sale of clocks or any other product unless it supervises said use and insures that the name is so utilized that:
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> 1. The public is clearly warned by a statement immediately in connection therewith, that the product is not manufactured by the Waltham Watch Company, of Waltham, Massachusetts, and,
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> 2. If the product is of foreign origin, the country of origin of the product is clearly and conspicuously disclosed on the product, on the advertising used in offering it for sale, and on any package or container in which the product is enclosed, in such manner that the name of the country of origin will not be hidden, obscured or obliterated.
>
> II. Placing any means or instrumentality in the hands of others whereby they may mislead the public, as to the manufacturer or any product which they sell, the manufacturer's age, experience and reputation or the country of origin of the product.
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> * * * *

(Appendix, *infra*, pp. 9-10).[3] The court of appeals affirmed (Pet. 4a-10a).

1. Petitioners' principal contention (Pet. 9-16) appears to be that the Commission barred use of the "Waltham" name in connection with imported products and restricted the name to products made at Waltham, Massachusetts, or in the United States, and in so doing exceeded its authority. However, the properiety of such an order is not an issue here. Petitioners have misstated the Commission's order which merely requires them not to permit the use of the Waltham name in a way which, as the Commission found, gives the false impression that the products (in connection with which the "Waltham" name is used) were made by the old Waltham Watch Company of Waltham, Massachusetts, or that the old company is connected with the distribution of foreign-made clocks.[4] There is no question of the Commission's authority to issue such an

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[3] The reprint in the petition of the Commission's decision and order (Pet. 3a) has omitted a paragraph.

[4] Petitioners suggest (Pet. 15) that their representations should have been held proper on the ground that the "old" Waltham Company of Waltham, Massachusetts, would have had the right to publish such advertisements if it had undertaken the sale of imported clocks. However, this is not the law. As the hearing examiner stated, "if Waltham of Massachusetts had embarked in a program of misrepresentation, such as that here disclosed, the fact that it was the original owner of a well-recognized name would not permit it to utilize that name in a manner calculated to deceive the public. *Edward P. Paul & Co., Inc.* v. *F.T.C.*, 169 F. 2d 294 (D.C. Cir. 1948)" (SS App. 40).

order, which is sanctioned by the settled rule that since a trademark is not a license to engage in unfair competition, its use to deceive may be curbed. *Federal Trade Commission* v. *Winsted Hosiery Co.*, 258 U.S. 483, 494; *Brougham* v. *Blanton Manufacturing Co.*, 249 U.S. 495, 499; *Irwin* v. *Federal Trade Commission*, 143 F. 2d 316, 325 (C.A. 8).

2. There is no merit to petitioners' argument (Pet. 13-14) that they should be permitted to continue their practices on the theory that otherwise they will be at a competitive disadvantage since "competitors whose acts and practices are identical will continue to use their equally well established trade names without qualification or limitation." In the first place, there is nothing in the record to show that petitioners' competitors are guilty of permitting their trade names to be used as petitioners did. Even if the record did show this, it would not justify petitioners' conduct, *Federal Trade Commission* v. *A. E. Staley Manufacturing Co.*, 324 U.S. 746, 753. Nor would the Commission be required to stay its order merely because petitioners would have been at a competitive disadvantage while their competitors were not under a similar restraint. *Moog Industries, Inc.* v. *Federal Trade Commission*, 355 U.S. 411.

3. Petitioners claim that they acted expeditiously in terminating Time's license to use the "Waltham" name (Pet. 16-18). The Commission found to the contrary (SS App. 28-31, 36) and the court below sustained this finding, declaring that petitioners "did nothing to stop the false representations until they figuratively felt the Federal Trade Commission breath-

ing down their necks" (Pet. 9a). Petitioners' claim thus goes to the substantiality of the evidence which plainly presents no question appropriate for review by this Court. *Federal Trade Commission* v. *Standard Oil Co.*, 355 U.S. 396, 401.

4. Petitioners' final claim (Pet. 18-20) is that Congress, by empowering the Commission under Section 14 of the Lanham Act, 60 Stat. 427, 433, as amended, 15 U.S.C. 1064, to apply for cancellation of a trademark under certain circumstances, terminated the Commission's power to deal with trademarks under Section 5 of the Federal Trade Commission Act. The Lanham Act itself refutes this contention. Section 46(a), 60 Stat. 445, provides that "nothing contained in this Act shall be construed as limiting, restricting, modifying, or repealing any statute in force on the effective date of this Act which does not relate to trade-marks, or as restricting or increasing the authority of any Federal department or regulatory agency except as may be specifically provided in this Act." See also, *Federal Trade Commission* v. *Elder Mfg. Co.*, 84 USPQ 429 (Com'r Pat.).

There is no conflict of decisions and no other reason for review by this Court. The petition for certiorari should be denied.

Respectfully submitted,

ARCHIBALD COX,
Solicitor General.

WILLIAM H. ORRICK, JR.,
Assistant Attorney General.

ROBERT B. HUMMEL,
IRWIN A. SEIBEL,
Attorneys.

JAMES McI. HENDERSON,
General Counsel,

J. B. TRULY,
Assistant General Counsel,

JOHN GORDON UNDERWOOD,
Attorney,
Federal Trade Commission.

OCTOBER 1963

APPENDIX

UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS:

Paul Rand Dixon, Chairman
Sigurd Anderson
William C. Kern
Philip Elman
Everette MacIntyre

Docket No. 7997

DECISION OF THE COMMISSION AND ORDER TO FILE REPORT OF COMPLIANCE

In the Matter of

WALTHAM WATCH COMPANY, a corporation, and HARRY ARONSON and LAWRENCE ARONSON, individually and as officers of said corporation, and DAVID SINGER, an individual trading as TIME INDUSTRIES, and MURIEL SINGER, individually.

This matter having been heard by the Commission upon the exceptions to the initial decision filed by respondents, Waltham Watch Company, Harry Aronson and Lawrence Aronson, and upon briefs and oral argument in support thereof and in opposition thereto; and

The Commission having determined that the hearing examiner's findings and conclusions are fully substantiated on the record and that the order contained in the initial decision is appropriate in all respects to dispose of this matter:

IT IS ORDERED that respondents' exceptions to the initial decision be, and they hereby are, denied.

IT IS FURTHER ORDERED that the hearing examiner's initial decision, filed November 14, 1961, as corrected by his orders filed December 11, 1961, and April 20, 1962, be, and it hereby is, adopted as the decision of the Commission.

IT IS FURTHER ORDERED that respondents, Waltham Watch Company, a corporation, Lawrence Aronson, as an officer of the said corporation, Harry Aronson, individually and as an officer of the said corporation, and David Singer and Muriel Singer, individually, shall, within sixty (60) days after service upon them of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which they have complied with the order to cease and desist.

By the Commission.

/s/ Joseph W. Shea
JOSEPH W. SHEA,
Secretary.

SEAL

ISSUED: June 15, 1962

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